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In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-1678

GEORGE BUCUVALAS,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Appeals Court for the Commonwealth of Massachusetts.

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GEORGE BUCUVALAS,
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v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

Petition for a Writ of Certiorari to the Appeals Court for the Commonwealth of Massachusetts.

The petitioner, George M. Bucuvalas, prays that a writ of certiorari issue to review the judgment of the Appeals Court of the Commonwealth of Massachusetts entered February 24, 1978.

Opinion Below.

The opinion of the Appeals Court of the Commonwealth of Massachusetts is reported as *Commonwealth* v. *Bucaulis*,[1] ____ Mass. App. Ct. ____, 373 N.E. 2d 221 (1978) (Mass. App. Ct. Adv. Sh. [1978] 124), and is reprinted as Appendix B to this petition at pp. 9a-18a. Further appellate review was denied by the Supreme Judicial Court of the Commonwealth of Massachusetts on March 28, 1978.[2] ____ Mass. ____ (1978) (Mass. Adv. Sh. [1978] 826).

Jurisdiction.

The judgment of the Appeals Court of the Commonwealth of Massachusetts was entered on February 24, 1978, and is reprinted as Appendix C to this petition at p. 19a. The Supreme Judicial Court of the Commonwealth denied further appellate review without opinion on March 24, 1978.[3] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Whether the enlargment of the scope of the criminal statute under which the petitioner was charged and the

[1]The Appeals Court of Massachusetts adopted the spelling of petitioner's name as it appeared in the criminal complaint. *See* App. B at 9a n. 1.

[2]Further appellate review by the Supreme Judicial Court of a decision of the Appeals Court is discretionary. Denial of further appellate review is not an affirmation of the decision or reasoning of the Appeals Court. *Ford* v. *Flaherty*, 364 Mass. 382, 387 (1973).

[3]See n. 2, *supra*.

application of that enlarged scope to the petitioner violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it constituted a retroactive and unforeseeable application of the criminal law?

2. Whether the petitioner was deprived of due process of law under the Due Process Clause of the Fourteenth Amendment to the United States Constitution because his conviction was based upon no or insufficient evidence of material elements of the offense and of corroboration as required by state law and because the affirmance of his conviction was based upon facts not in the record and failed to account for facts in the record bearing on material issues?

3. Whether the trial justice's instructions to the jury and failure to instruct as requested deprived the petitioner of due process of law under the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to require the prosecution to prove beyond a reasonable doubt every fact necessary to establish all material elements of the offense with which petitioner was charged?

Constitutional Provision Involved.

Constitution of the United States, Amendment XIV:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ..

Statutes Involved.

Massachusetts General Laws c. 272, § 6 (one controlling a place, inducing or suffering female to resort there for sexual intercourse):

> Whoever, being the owner of a place or having or assisting in the management or control thereof induces or knowingly suffers a female to resort to or be in or upon such place, for the purpose of unlawfully having sexual intercourse, shall be punished as provided in section three.

Massachusetts General Laws c. 272, § 11 (corroboration of one witness; limitations):

> A person shall not be convicted under sections two to six, inclusive, upon the evidence of one witness only, unless his testimony is corroborated in a material particular, and prosecution for a violation of any of said sections shall not be commenced more than one year after the commission of the crime.

Statement of the Case.

Petitioner was the President of United Food Corporation and was the manager of a night club and lounge owned and operated by that corporation in Boston, Massachusetts. On October 14, 1976, a customer of the lounge, Edward Wolfe, engaged in a consensual act of fellatio on the premises with a female, Connie Peria, who was employed by the corporation as a dancer and entertainer at the lounge.

A criminal complaint issued against petitioner charging him with "knowingly suffering a female to resort to or be in or upon [that place] for the purpose of unlawfully having sexual intercourse." (*See* Statutes Involved.) Petitioner moved to dismiss the complaint, raising as issues whether the statute was unconstitutionally vague, whether it did apply or could constitutionally be applied in this case to consensual acts in private, and whether it did apply or could constitutionally be applied in this case to an act or a purpose to engage in an act other than sexual intercourse. (R. 4-5; App. A at pp. 1a-2a).[4] Defendant preserved his exception to the denial of the motion (Tr. 26)[5] and pursued the issues on appeal (R. 19-31; App. A at pp. 4a-8a).

At trial, evidence was introduced to show that the lounge consists of three rooms, in each of which there is a stage upon which the dancers and entertainers perform. Around each stage is a bar and barstools and at the perimeter of each room are booths. The entertainment at the lounge consists of dancing and music. When the dancers and entertainers are not dancing, they mingle with the customers and attempt to get them to purchase drinks and bottles of champagne. Mr. Wolfe entered the lounge, sat at the bar in the main lounge, ordered a drink and engaged in conversation with the barmaid. Peria came over and engaged in conversation with him,[6] after which he purchased

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[4] References to (R.) are to the printed summary of the record which contains the documents filed in the trial court.

[5] References to (Tr.) are to the transcript of the testimony and other proceedings at trial.

[6] The conversation was not admitted as against petitioner (Tr. 175-177) although it was admitted against Connie Peria, who was a codefendant and was convicted of prostitution. In Argument II, *infra*, petitioner challenges the Appeals Court's reliance on the excluded conversation to sustain petitioner's conviction.

a bottle of champagne and they went to a second lounge to the side of the main lounge.

The lounge to which Wolfe and Peria went was used only in the evening. At the time of the incident, it was closed to the public, had a door, was otherwise unoccupied and was pitch black such that one could not see into the room with the naked eye and could not see in the booth unless one were in the booth itself. Both Peria and Wolfe were in the lounge for approximately 20 minutes, during which time they had conversation and drank champagne. Wolfe then talked Peria into performing an act of fellatio upon him.

Mr. Wolfe did not see petitioner talk to the barmaid or to Peria and did not see him in the main lounge or the side lounge where the act occurred at any time. He did not see petitioner on the premises until after he and Peria exited from the room upon completion of the act. When the police entered the premises, they were met by petitioner at the reception booth at the front door of the lounge. He accompanied them on an inspection of the premises and they observed Peria and Wolfe exit separately from the closed room, entered the room and saw a bottle of champagne and two glasses on the table.

At the close of the Commonwealth's case, petitioner moved for a directed verdict of not guilty on the grounds that there was no or insufficient evidence that the female had the purpose required under the statute or that petitioner had the requisite knowledge, that there was no corroboration as required by Massachusetts General Laws c. 272, § 11 (*see* Statutes Involved), and that the statute could not be applied to an act of fellatio or to a purpose to engage in that act or to a private consensual sexual act between adults or to a purpose to engage in such an act. Petitioner preserved his exception to the denial of the motion and pursued the issues on appeal (Tr. 244; R. 21-22; App. A at p. 5a).

Upon the close of all the evidence, petitioner renewed his motion for a directed verdict of not guilty on the same grounds and preserved his exception to its denial (Tr. 245; R. 22-23; App. A at p. 5a).

By request for instructions to the jury, petitioner again asserted that the statute did not apply to acts other than sexual intercourse or to acts or a purpose to engage in acts which were consensual and between adults in private (R. 14-16; App. A at pp. 2a-3a). Exceptions to the refusal to give these instructions were noted and the issues were pursued on appeal (R. 23-25; 28-29; App. A at pp. 6a-8a).

Upon conviction, petitioner was sentenced to serve three months in the house of correction and to pay a $1,250 fine. A motion for stay of execution of sentence pending appeal was denied by the trial justice, but granted by an appellate justice. The stay was vacated subsequent to the denial of petitioner's application for further appellate review by the Supreme Judicial Court and petitioner commenced serving his sentence on April 3, 1978.

Reasons for Granting the Writ.

I. The Enlargement of the Scope of the Criminal Statute under Which the Petitioner was Charged and the Application of that Enlarged Scope to the Petitioner Violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution in that it Constituted a Retroactive and Unforeseeable Application of the Criminal Law.

This case, like *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), involves a judicial expansion and retroactive applica-

tion of the narrow and precise language of a state statute to conduct which was not previously within the reach of the statute.

Petitioner contends that, prior to the decision by the Appeals Court in his case applying the statute to an act of fellatio, the term "sexual intercourse" as used in Massachusetts General Laws c. 272, § 6, referred only to the act by which the male sexual organ penetrates the female sexual organ. That meaning derives from both the common usage and understanding of that term and the unvarying definition of that term in Massachusetts case law. *See* Argument I.A.1., *infra*. The expansion of the meaning of the term and its unforeseeable and retroactive application violates the Due Process Clause of the Fourteenth Amendment. *See* Argument, I.A.2., *infra*.

The decision of the Appeals Court is in direct conflict with decisions of this Court in *Bouie* v. *City of Columbia*, *supra*, and *Douglas* v. *Buder*, 412 U.S. 430 (1973). It is also in conflict with the rationale of *Rose* v. *Locke*, 423 U.S. 48 (1975), mentioned in the Appeals Court decision, for the reason that that decision upheld the application of the state statute only because the state had previously given persons every reason to believe that the acts for which the prosecution was commenced were within the statutory language.

This is not an isolated case or an isolated decision by the Appeals Court. While counsel cannot state how many prosecutions are still pending under this statute, they can state that they represent five other defendants against whom prosecutions under this statute are still pending for acts of fellatio or attempted acts of fellatio which occurred prior to the decision of the Appeals Court in this case. Accordingly, a decision by this Court on this issue will directly resolve issues in at least five other prosecutions under this statute.

Petitioner also raises as a federal issue whether the statute is unconstitutionally vague as applied to his knowingly allowing a female to engage in a private and consensual act of fellatio on his premises because the Supreme Judicial Court of Massachusetts has previously held that a private and consensual act of fellatio between adults is not a criminal act subject to prosecution in Massachusetts. *See Commonwealth* v. *Balthazar*, 366 Mass. 298 (1974).

A. *The Unforeseeable and Retroactive Enlargement of the Meaning of the Term "Sexual Intercourse" and its Application to the Facts of this Case Deprived the Petitioner of Due Process of Law.*

1. The Meaning of the Term "Sexual Intercourse" as Commonly Used and Understood and as Judicially Construed in Massachusetts Case Law.

The point of reference for determining the meaning of the language of G.L. c. 272, § 6, is the date of the alleged offense — October 14, 1976. Petitioner contends that by the term "sexual intercourse" in G.L. c. 272, § 6, was meant the act by which the male sexual organ penetrates the female sexual organ and not the act of fellatio.

Dictionaries provide the meanings of the terms "sexual intercourse," "fellatio" and "carnal knowledge" as they are commonly used and understood.[7] "Sexual intercourse" is defined as "Coitus, especially between humans." *The American Heritage Dictionary* (1973) 1138. "Carnal knowl-

[7] The dictionary definition of "carnal knowledge" is included here because the predecessor version of G.L. c. 272, § 6, used the language "being unlawfully and carnally known" and because judicial decisions have uniformly equated the terms "sexual intercourse" and "carnal knowledge." See n. 8 and accompanying text, *infra*.

edge" is defined as "Sexual intercourse." *Id.* at 205. "Fellatio" is defined as "Oral stimulation of the penis." *Id.* at 483. *Webster's Third New International Dictionary* (1964) is in accord, as is *Black's Law Dictionary* (4th ed. 1968). Thus, common usage and understanding reflects the distinction between the two types of sexual acts and there is no confusion as to the specific physical act which each word describes or any overlap between the words "fellatio" and "sexual intercourse."

Massachusetts case law unvaryingly has construed the terms "sexual intercourse" and "fellatio" in accordance with this common usage and understanding. That construction has been in line with a long-standing law of the Commonwealth that "[i]f, in the use of terms defining an offence, the legislature have used language indicating a particular species of immorality, the court can only give a like effect to such words." *Commonwealth* v. *Cook*, 53 Mass. (12 Met.) 93, 96-97 (1846). Thus, in *Commonwealth* v. *Lynes*, 142 Mass. 577, 581-582 (1886), the Supreme Judicial Court held that the crime of incest required commission of the act of sexual intercourse and that the trial judge properly instructed the jury that proof of carnal knowledge and penetration were necessary to convict the defendant. *See also Commonwealth* v. *McCan*, 277 Mass. 199, 203 (1931); *Commonwealth* v. *Hussey*, 157 Mass. 415, 416 (1892). In *Commonwealth* v. *Squires*, 97 Mass. 59 (1867), the Supreme Judicial Court held that:

> [F]rom very early times, in the law, as in common speech, the meaning of the words "carnal knowledge" of a woman by a man has been sexual bodily connection; and these words, without more, have been used in that sense by writers of the highest authority on criminal law, when undertaking to give a full and precise definition of the crime of rape. 97 Mass. at 61.

The difference between carnal copulation and other types of sexual acts was made clear in *Commonwealth* v. *Delano*, 197 Mass. 166, 166-167 (1908), where the Court held that a prior version of c. 272, § 35, which made criminal the commission of any and all unnatural and lascivious acts with another person, could not be applied to an act of copulation because "[c]opulation is the natural act of coition and is not within the statute." In *Commonwealth* v. *Balthazar*, 366 Mass. 298, 302 (1974), the Supreme Judicial Court held that an act of fellatio is an unnatural and lascivious act within the meaning of G.L. c. 272, § 35. *See also Commonwealth* v. *Deschamps*, 1 Mass. App. Ct. 1 (1972).

From these cases it is clear that Massachusetts courts have always distinguished between carnal knowledge (which is sexual intercourse), on the one hand, and unnatural and lascivious acts, on the other. Thus, judicial decisions interpreting the term "sexual intercourse" are fully in accord with the common usage and understanding of the term set forth above and make clear that sexual intercourse is the act by which the male sex organ penetrates the female sex organ, that it is a different act than the act of fellatio, and that the two acts have never been considered to be under the same statute in the Commonwealth of Massachusetts.

Further support for petitioner's contention may be found in the recent legislative amendment of the Massachusetts rape statute and in case law interpreting that amendment. In 1974 the Massachusetts Legislature amended the Massachusetts rape statute (G.L. c. 265, § 22) to provide a punishment for both "sexual intercourse . . . [and] unnatural sexual intercourse" (Stat. 1974, c. 474, § 1) where the statute

had previously made criminal only the forcible commission of "carnal knowledge." If the Legislature had thought or intended that the words "sexual intercourse" included acts of fellatio, it would not have distinguished between "sexual intercourse" and "unnatural sexual intercourse" in the amendment.

The recent decision of the Supreme Judicial Court in *Commonwealth* v. *Gallant*, ____ Mass. ____ (1977) (Mass. Adv. Sh. [1977] 2254), interpreting and construing the new rape statute, reenforces petitioner's contentions:

> By sexual intercourse, the Legislature undoubtedly intended the traditional common law notion of rape, the penetration of the female sex organ by the male sex organ, with or without emission. . . . Similarly, the definition of "unnatural sexual intercourse" must be taken to include oral and anal intercourse, including fellatio, cunnilingus, and other intrusions of a part of a person's body or other object into the genital or anal opening of another person's body. *Id.* at 2263.

See also Commonwealth v. *Gonzales*, ____ Mass. App. Ct. ____ (1977) (Mass. App. Ct. Adv. Sh. [1977] 1211), holding that forcible sexual intercourse violates the "sexual intercourse" portion of G.L. c. 265, § 22, and that forcible anal intercourse violates the "unnatural sexual intercourse" portion of the statute.

In the *Gallant* decision, the court also noted that the words "unlawful sexual intercourse" had been used synonymously with "unlawful carnal knowledge" in many previous decisions in Massachusetts."[8] *Id.* at 2263 n. 7.

[8]The predecessor version of c. 272, § 6, used the words "being unlawfully and carnally known" in place of the words "unlawfully having

It is thus certain from the dictionary definitions of the term "sexual intercourse," which reflect common usage and understanding, and from the unvarying decisions in Massachusetts cases, which reflect the legal counterpart, that the term "sexual intercourse" has one and only one meaning in Massachusetts and that that meaning is the one propounded by petitioner — the act by which the male sexual organ penetrates the female sexual organ. The term "sexual intercourse" has not only never been held to refer to an act of fellatio, but every decision supports the contention that the two physical acts are separate and distinct acts which are known by different names and referred to by different terms.

2. The Term "Sexual Intercourse" was Judicially Enlarged and Retroactively Applied in Petitioner's Case in Violation of the Due Process Clause.

In the state court proceedings, petitioner first asserted that G.L. c. 272, § 6, was unconstitutionally vague by his motion to dismiss the complaint in the Superior Court. In part, the motion was based on the inapplicability of the statute where the act upon which the prosecution was based was an act of fellatio or a purpose to engage in such conduct. When the prosecution rested its case, petitioner again pursued the point by moving for a directed verdict of not guilty and arguing that the statute could not constitutionally be applied to the facts in this case. Petitioner again asserted his legal theory of the case in his requests for instructions to

sexual intercourse." *See* Stat. 1886, c. 329, § 5. In its brief to the Appeals Court of Massachusetts, the Commonwealth asserted that the words "sexual intercourse" were coextensive in meaning with the words "carnal knowledge." This identity, of course, is precisely the petitioner's point.

the jury which included an instruction defining sexual intercourse as the natural act of coition or copulation. This request was denied and the justice instructed that both sexual intercourse and unnatural sexual intercourse, as those terms are used in the rape statute, were prohibited by G.L. c. 272, § 6, and constituted sexual intercourse under that statute. Exceptions were saved to each adverse ruling. On appeal, the petitioner again pursued all of the above arguments.

In each instance in the trial court and on appeal, the prosecution contended and the court held or ruled that an act of fellatio is an act of sexual intercourse within the meaning of G.L. c. 272, § 6. *See Commonwealth* v. *Bucaulis*, ____ Mass. App. Ct. ____ (1978) (Mass. App. Ct. Adv. Sh. [1978] 124, 132), holding that:

> The term "sexual intercourse" has commonly been employed to describe a variety of sexual conduct, including the act of fellatio. . . . There is nothing before us which indicates that the act of fellatio was previously considered to be outside the scope of the statute. . . . We accordingly conclude that the defendant should have understood that his conduct was in violation of the statute. (App. B at p. 16a.)

At no time was any authority binding upon petitioner given for that ruling.[9] Indeed, not only was there no authority to

[9]The Appeals Court did refer to *Commonwealth* v. *Gallant*, *supra*, in support of its decision. However, as noted above, that decision supports the petitioner's argument and not the Appeals Court ruling. Even if the decision did support the Appeals Court ruling, it could not be relied upon to support petitioner's conviction since it was not decided prior to the date of the alleged offense and therefore gave no notice as to the change in the construction of the term "sexual intercourse" from all

support the court's rulings, but all authority as to the meaning of the statute supports petitioner's argument. *See* Argument I.A.1., *supra*. Thus, there was both an enlargement of the meaning of the term "sexual intercourse" which was not foreseeable and an application of that new meaning to the facts of this case. This factor distinguishes this case from *Rose* v. *Locke*, 423 U.S. 48 (1975), which the Appeals Court mentioned in its opinion. The United States Supreme Court held in that case that the state had previously held that the conduct involved was within the reach of the challenged statute. Thus, the application of the statute to that defendant was not unforeseeable. Had the prior meaning of the term "sexual intercourse" been adhered to in this case, petitioner would have prevailed. This is precisely the type of action held to be impermissible under the Due Process Clause of the Fourteenth Amendment in *Bouie* v. *City of Columbia*, *supra*, and *Douglas* v. *Buder*, *supra*. The petition should be granted to review this issue.

B. *General Laws c. 272, § 6, is Unconstitutional as Applied to a Private and Consensual Act of Fellatio Between Adults.*

Assuming that petitioner's rights were not violated for the reasons set forth in Argument I.A., *supra*, petitioner contends here that G.L. c. 272, § 6, is unconstitutional as applied to a private and consensual act of fellatio between adults. In subargument 1, *infra*, petitioner asserts that the

prior decisions. *See Balthazar* v. *Superior Court*, 428 F. Supp. 425 (D. Mass. 1977), *aff'd*, No. 77-1159 (1st Cir. April 4, 1978), granting a writ of habeas corpus where there had been no construction of the statute involved *prior* to the defendant's conduct while holding that interim decisions saved the constitutionality of the statute *in futuro*. Thus, for purposes of determining the foreseeability of the enlargement of the meaning of the term, *Gallant* does not support the court's application of the term to the conduct here.

statute was unforeseeably and retroactively applied to conduct which was not criminal when it was engaged in. In subargument 2, *infra*, petitioner asserts that unless the statute is construed as not applicable to private and consensual acts of adults, it is unconstitutionally vague as applied because it failed to give adequate notice, in light of *Commonwealth* v. *Balthazar*, *supra*, that a private consensual act of fellatio between adults was unlawful.

1. Chapter 272, § 6, was Unforeseeably and Retroactively Applied to a Private and Consensual Act of Fellatio Between Adults — An Act which was not Criminal When Engaged In.

General Laws c. 272, § 6, does not make criminal one's knowingly permitting a female on his premises for the purpose of having sexual intercourse under any and all circumstances, but applies only when the purpose of the female is *unlawfully* to have sexual intercourse.

By common usage and understanding, the word "unlawful" means "[t]hat which is contrary to law or unauthorized by law . . . [t]hat which is not lawful . . . [t]he acting contrary to, or in defiance of the law; disobeying or disregarding the law." *Black's Law Dictionary*, *supra*, at 1705. An "unlawful act" is defined as an "[a]ct contrary to law, and presupposes that there must be an existing law." *Id.* "Unlawfully" is defined as "[i]llegally; wrongfully." *Id.* at 1706.

In *Commonwealth* v. *Balthazar*, *supra*, the Supreme Judicial Court held that a private and consensual act of fellatio between adults is not unlawful in Massachusetts. In *Commonwealth* v. *Scagliotti*, ____ Mass. ____ (1977) (Mass. Adv. Sh. [1977] 2323), the court held that privacy means "removal from the public view and elimination of

the possibility that . . . [a] defendant's conduct might give offense to persons present in a place frequented by members of the public for reasons of business, entertainment, or the like." *Id.* at 2325. In that case, the defendant had solicited a police officer to commit an unnatural act in a cubical in a theatre open to the public. The court held that a question of privacy was presented for the jury's consideration.

The two cases cited make clear that, to determine whether a purpose to engage in a sexual act is a purpose to engage in an unlawful act, one must have reference to the circumstances under which that act would occur. In this case, the act occurred in a room which was closed to the public, had a door, was unoccupied by any other persons, and was so dark that one could not see into the room with the naked eye and could not see into the booth unless one were in the booth. A clear question of privacy was presented for the jury even if the court could not rule as a matter of law that the act was in private. Thus, even if one could infer from Connie Peria's performance of a consensual act of fellatio in private with Mr. Wolfe that she had a purpose to engage in such an act, the statute was applied to an act and a purpose to engage in an act under circumstances which would not render that act unlawful.[10] Thus, the statute was unforeseeably and retroactively applied to conduct which was not unlawful at the time that the conduct was engaged in. Such an application violates the Due Process Clause of the Fourteenth Amendment and the principles underlying the

[10] It is noted that the state courts did not use this approach to deny the petitioner's arguments and to sustain his conviction. They clearly relied upon a holding that an act of fellatio is an act of sexual intercourse. *See* Argument I.A., *supra*. Throughout the state court proceedings, however, petitioner argued that a private and consensual act of sexual intercourse was not unlawful in light of the decision in *Balthazar* and includes that argument here as an alternative to the argument set forth in I.A., *supra*.

United States Supreme Court's decisions in *Bouie* v. *City of Columbia*, *supra*, and *Douglas* v. *Buder*, *supra*.

2. General Laws c. 272, § 6, is Unconstitutionally Vague as Applied in that it Fails to Provide Adequate Notice that a Private Consensual Act of Fellatio is Unlawful.

The clear implication, although not the express holding, of the Appeals Court in petitioner's case is that G.L. c. 272, § 6, makes criminal the knowing allowance of a female to be on premises for the purpose of engaging in an act of fellatio even if that act is between consenting adults and in private. If such is the meaning to be given to the statute, then the petitioner contends that the statute is unconstitutionally vague in that it fails to provide adequate notice that such an act is an unlawful act.

The clear meaning of the decision in *Commonwealth* v. *Balthazar*, *supra*, is that private and consensual sexual acts of adults are not matters which certain state statutes regulate even if the state has authority to regulate such conduct. While the decision in that case concerned unnatural sex acts under G.L. c. 272, § 35, it gave the public every reason to believe that natural sex acts and unnatural acts under similar statutes would be outside of the prohibition of those statutes. That reason is even stronger where the act held to be unlawful — namely, fellatio — has previously been held not to be unlawful when engaged in by consenting adults in private. Accordingly, to the extent that c. 272, § 6, has reference to other statutes or contemporary community standards to determine what conduct is criminal, *see* Argument I.B.1., *supra*, it leaves an individual of common understanding and intelligence with an expectation that consensual private sex acts are not unlawful. That such an

expectation is a reasonable expectation — indeed, even an accurate expectation — is clear from Massachusetts case law decided after the date of the alleged offense. In *Commonwealth* v. *Reilly*, ___ Mass. App. Ct. ___ (1977) (Mass. App. Ct. Adv. Sh. [1977] 736), the Appeals Court used broad language in rejecting an assertion by the Commonwealth that a defendant bears the burden of proving a private and consensual act. The court stated that the Commonwealth's contention

> misconceives the significance of the *Balthazar* case. That case concluded that "consensual conduct in private between adults is not prohibited by [G.L. c. 272,] § 35.". . . That the act was consented to is not "a matter of excuse or justification" . . . for unnatural and lascivious conduct — however pejorative that expression may be — is no longer, in those circumstances, a crime required to be excused or justified. *Id.* at 739.

The case of *Commonwealth* v. *Scagliotti*, *supra*, is equally helpful in determining the implications of *Commonwealth* v. *Balthazar*, *supra*. The court held that a consensual unnatural act must be committed in a public place in order to be punishable and that the public nature of the consensual act is an essential element to be proved by the prosecution.

Throughout the state court proceedings, at every available opportunity, the petitioner challenged the application of c. 272, § 6, to the conduct involved in this case on the ground that the statute was unconstitutionally vague if it applied to one's knowing sufferance of a female to be on premises for the purposes of engaging in a private and consensual act of fellatio. The trial court rejected the petitioner's arguments and the Appeals Court sustained that

rejection by asserting that those privacy rights which might be recognized with regard to certain sexual conduct engaged in between consenting adults in private cannot be raised in defense of the commission of prostitution on premises to which the public has access. *Commonwealth* v. *Bucaulis*, *supra*, at 131 (App. B at p. 15a). That assertion is clearly erroneous for three reasons. First, as is manifestly apparent from *Commonwealth* v. *Reilly*, *supra*, and *Commonwealth* v. *Scagliotti*, *supra*, the private and consensual nature of the act is not a matter of defense but is an affirmative part of the Commonwealth's case.[11] Second, the petitioner was not charged with permitting prostitution on the premises. Such a possible charge arises under entirely different statutes, *see* G.L. c. 139, §§ 4, 5 and 20, and raises entirely different issues. Third, *Commonwealth* v. *King*, ___ Mass. ___ (1977) (Mass. Adv. Sh. [1977] 2636), was incorrectly cited by the Appeals Court because there the Supreme Judicial Court expressly stated, "we do not decide whether . . . [a conviction for prostitution based on performance of sexual acts in private] would implicate a right of privacy." *Id.* at 2646.

Finally, any limitation upon the right of individuals to assert that private consensual acts of fellatio are not unlawful, which may be derived from *Commonwealth* v. *King*, does not affect the issue whether G.L. c. 272, § 6, is unconstitutional as applied to conduct which occurred in 1976 — a time prior to the decision in *Commonwealth* v. *King*. *See Balthazar* v. *Superior Court*, *supra*.

For the foregoing reasons, petitioner requests that a writ of certiorari issue.

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[11] Rejecting the petitioner's requests for instructions, the trial justice did not instruct that the Commonwealth bore the burden of proof on these elements. This also was erroneous. *See Mullaney* v. *Wilbur*, 421 U.S. 684 (1975).

II. Petitioner was Deprived of Due Process of Law Because his Conviction was Based upon No or Insufficient Facts to Support Findings that the Female Had a Purpose of Unlawfully Having Sexual Intercourse or that Petitioner Had Knowledge of that Purpose and there was No Corroboration as Required by Massachusetts General Laws c. 272, § 11, and Because the Affirmance of his Conviction by the Appeals Court was Based upon Facts Not in the Record and Failed to Account for Facts in the Record Bearing on Material Issues.

As a matter of constitutional law, a conviction based upon no or insufficient facts establishing a violation of the applicable statute deprives a defendant of due process of law under the Fourteenth Amendment to the United States Constitution. *See Bouie* v. *City of Columbia*, *supra*; *Douglas* v. *Buder*, *supra*. Petitioner contends that on two of the express material elements of G.L. c. 272, § 6, there were no or insufficient facts to sustain his conviction. He also asserts that there was no corroboration as required by state law of the testimony of a witness in a material particular and that his conviction was sustained on the basis of facts not in the record and without accounting for facts in the record which bear on material issues.

A. *There was No Evidence that Connie Peria Resorted to or was in or Upon the Premises for the Purpose of Unlawfully Having Sexual Intercourse.*

The only direct evidence relating to the purpose for which Connie Peria was on the premises was introduced by the Commonwealth and, if believed, would warrant the jury in finding that her purpose in being on the premises

was to act as a dancer and entertainer. A purpose of unlawfully having sexual intercourse could certainly not be inferred from this fact. Further, no act of sexual intercourse or offer to engage in an act of sexual intercourse occurred on the premises. No statement of intention or purpose by Peria to be on the premises for the purpose of having sexual intercourse was introduced as evidence. Even if an act of fellatio were considered to be an act of sexual intercourse within the meaning of the statute, there was insufficient evidence to establish that Peria resorted to or was on the premises for the purpose of engaging in such an act. Not mentioned or accounted for in the Appeals Court opinion but introduced at the trial was Mr. Wolfe's admission that, when he and Peria went to the darkened room, she did not do anything until he talked her into playing with him and then performing fellatio on him. The fact that Mr. Wolfe had to talk her into performing the act, in light of the testimony as to the nature of her employment as a dancer and entertainer, bears directly on the question of her purpose. *See Yoder* v. *United States*, 80 F. 2d 665 (10th Cir. 1935), holding that proof of a narrowly defined purpose can only be established by proof of that specific purpose and not by proof of a mere inclination or willingness to do the act for which purpose must be shown. Proof of purpose requires proof of motivation. *Id.* at 670.

In addition, there was no proof that an act of sexual intercourse was engaged in. As asserted in Argument I.A., *supra*, sexual intercourse is a narrowly defined act, evidence of which was lacking in this case.

Finally, there was no evidence that Connie Peria's purpose of engaging in an act of sexual intercourse was to engage in such an act under circumstances which would make that act unlawful. For the reasons stated in Argument I.B., *supra*, in order to be unlawful the act would

have to be performed either between nonconsenting adults or not in private. There was no evidence that the act was either nonconsensual or not in private. The Commonwealth bears the burden on each of these issues. *Commonwealth* v. *Scagliotti, supra*, at 2324. Its failure to introduce any evidence on these issues constitutes a failure to meet the burden of its case-in-chief.

Accordingly, there was no or insufficient evidence that Connie Peria resorted or was in the premises for the purpose of unlawfully having sexual intercourse.

B. *There was No or Insufficient Evidence that Petitioner Had Knowledge of Connie Peria's Purpose.*

Contrary to the assertion of the Appeals Court in its decision that the petitioner was present in the lounge during the events that issue in this case, *see Commonwealth* v. *Bucaulis, supra*, at 125 (App. B at p. 10a), the record in this case affirmatively lacks evidence to support such a finding. Mr. Wolfe testified that he never saw petitioner talk to the barmaid or to Connie Peria, nor did he see petitioner in the main bar or in the closed room where the act was performed. He testified that he did not see the petitioner until after he had exited from the room and all of his conversations with Peria and the act itself were completed. When the police officers entered the premises, they found the petitioner at the front door in the reception booth. Mr. Wolfe had been in the darkened room for approximately 20 minutes before he exited. It was prior to the time when he went into that room that he engaged in his conversation with Peria at the bar. These facts fall far short of permitting a finding that petitioner was present in the lounge during the events at issue in this case.

While physical presence on the premises is not a material element of an offense under c. 272, § 6, it bears directly on the question of knowledge. In *Commonwealth* v. *Altenhaus*, 317 Mass. 270 (1944), the Supreme Judicial Court held that the word "knowingly" when used in a criminal statute commonly imports a perception of the facts requisite to make up the crime. *Id.* at 273. The facts which are requisite here to make up the crime consist of a perception of the fact that Connie Peria resorted to or was on the premises for the purpose of unlawfully having sexual intercourse and the knowing sufferance of her to be there for that purpose. Given Connie Peria's employment as a dancer and entertainer, petitioner would naturally have expected her to be on the premises, even if it could be found that he knew she was there on the date in question. However, no evidence was presented even of that fact. The *Altenhaus* case is particularly instructive on the strictness of the knowledge requirement and a comparison of the evidence in each case shows that the requirement was not met here.

The Appeals Court, in its decision affirming the conviction, implicitly acknowledged the lack of evidence of petitioner's knowledge of the requisite purpose by relying upon facts which clearly do not establish such knowledge. First, the Appeals Court asserted that the evidence in the case indicates a transaction for sexual services undertaken openly at the bar. No evidence was introduced as against petitioner that there was a transaction for sexual services. Mr. Wolfe's testimony concerning his conversation with Miss Peria was excluded as against petitioner.[11] Accordingly, the Appeals Court, as well as the jury, could not rely upon it to support the conviction. Moreover, there was no showing that the transaction, if one could be found to have occurred, was "open." Without the type of inquiry required by *Commonwealth* v. *Scagliotti*, *supra*, the Appeals Court's characterization of the transaction as "open" is without support. Finally, the prohibition of c. 272, § 6, is against a purpose of engaging in the act under circumstances which would constitute that act as unlawful.

[11]See n. 6 and accompanying text, *supra*.

Secondly, the Appeals Court asserts that the transaction was undertaken by persons "normally under the direct supervision of the defendant." *Id.* at 129 (App. B at p. 13a). This statement constitutes an implicit recognition that there was no evidence that the employees were under the direct supervision of the petitioner at the time that any transaction or unlawful act occurred. There was no evidence in the case showing that unlawful acts had occurred at any other time such as might give rise to an inference of complicity by the petitioner in this particular conduct.

Finally, the Appeals Court refers to "all the other circumstances in the case" from which the jury could reasonably conclude that the petitioner was aware of and acquiesced in the unlawful conduct. *Id.* at 129 (App. B at p. 13a). No such other circumstances are recited in the opinion nor was there evidence of such other circumstances in the record. The mere statement does not make up for the missing proof.

For the foregoing reasons, petitioner asserts that there was no or insufficient evidence of his knowledge of the unlawful act and, therefore, that his conviction violates the Due Process Clause of the Fourteenth Amendment.

C. *There was No Corroboration as Required by General Laws c. 272, § 11.*

Massachusetts General Laws c. 272, § 11, requires that a defendant shall not be convicted of a violation of c. 272, § 6, upon the testimony of one witness only unless that wit-

ness' testimony is corroborated in a material particular. That section, therefore, creates a substantive rule of law enuring to the benefit of defendants to charges under c. 272, § 6, and giving them an affirmative protection against conviction if the statute is not satisfied. That right is a right protected by the Due Process Clause of the Fourteenth Amendment, the satisfaction of which presents a federal question. Mere assertion by a state court that the requirements of the statute have been met cannot escape review, any more than a state court's assertion that there is sufficient evidence to convict a defendant can escape review against a challenge that the conviction was based upon no or insufficient evidence.

In this case, the only corroboration consisted of the police officers' observations of Peria and Wolfe emerging from the darkened room of the lounge and their discovery of a bottle of champagne and two glasses in a booth in that lounge. The Appeals Court assertion that these observations constituted corroboration, within the meaning of the statute, of the fact that an act of fellatio occurred in the darkened room is preposterous. There is no logical or legal relevancy between the facts corroborated and the material particular which must be corroborated in order to find that the statute has been satisfied. This corroboration is no more than was found inadequate in *Commonwealth* v. *Williams*, 353 Mass. 233 (1967), where the court held that a defendant's admission that he was present with the complaining witness in her apartment did not constitute corroboration under this statute. It is clear from *Commonwealth* v. *DeBrosky*, 363 Mass. 718 (1973), that the corroboration requirement of c. 272, § 11, is an explicit requirement which can only be satisfied by corroboration of the defendant's knowledge of the purpose for which the female is alleged to have resorted to the premises. *Cf. id.* at 729.[13]

For the foregoing reasons, petitioner contends that his conviction was returned and affirmed without satisfaction of the corroboration requirement of c. 272, § 11, in that there were no or insufficient facts to establish such corroboration. Accordingly, his conviction violates the Due Process Clause.

III. The Instructions to the Jury Deprived Petitioner of Due Process of Law.

Petitioner made several requests for instructions to the jury which were denied by the trial justice. In addition, he took exception to several instructions actually given by the justice. In addressing these issues on appeal, the Appeals Court did not independently state its reason for overruling petitioner's objection on each point raised, but instead asserted that the charge as a whole did not deprive him of his rights. *See Commonwealth* v. *Bucaulis*, *supra*, at 133 (App. B at pp. 16a-17a).

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[13] That there was no corroboration of Peria's purpose in being on the premises is clear from the evidence. Indeed, the Commonwealth's own witnesses contradict the assertion that she was on the premises for the purpose required under § 6 in that one of the police officers testified that she was employed at the lounge as a dancer and entertainer.

A. *The Trial Justice Failed to Instruct as Requested that the Term "Sexual Intercourse" Refers to the Natural Act of Coition or Copulation and does Not Refer to Types of Sexual Acts Other than that Act and Erred by Instructing that the Term "Sexual Intercourse" Includes Unnatural Acts.*

Petitioner requested an instruction derived from *Commonwealth* v. *Delano*, *supra*, that sexual intercourse is the natural act of coition or copulation. The trial justice refused to give this instruction and instructed that sexual intercourse refers to both sexual intercourse and unnatural sexual intercourse, as those terms are used in the rape statute. For the reasons set forth in Argument I.A., such instructions were erroneous and expanded the scope of the statute beyond its meaning as of the date of the offense. This expanded scope permitted the jury to find petitioner guilty of an act which was not within the reach of the statute on the date of the alleged offense and, therefore, deprived him of due process of law. *See* Argument I.A., *supra*.

B. *The Trial Justice Refused to Instruct the Jury as Requested by the Petitioner or by Any Other Instruction that They were Required to Determine the Issue Whether the Act which Occurred was Unlawful and that Sexual Intercourse Between Unrelated, Consenting Adults in Private is Not Unlawful; He Further Failed to Instruct as Requested or by Any Other Instruction as to the Circumstances under which the Jury Could Find that the Act was Committed in Private.*

As is set forth in Argument I.B., *supra*, it is the law of the Commonwealth that an act of fellatio which occurs between consenting adults and in private is not unlawful.

See Commonwealth v. *Balthazar*, *supra*. In order to show that the act was unlawful, the Commonwealth bears the burden of proving that the act was either nonconsensual or not in private because those elements are material elements of the offense. *See Commonwealth* v. *Scagliotti*, *supra*; *Commonwealth* v. *Reilly*, *supra*. The failure of the trial justice to require the jury to determine whether the act was between consenting adults and in private eliminated the prosecution's burden of establishing its case-in-chief. It is a matter of constitutional law that the state must prove every fact necessary to establish the material elements with which a defendant is charged in order to maintain his conviction. *See Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970). The elimination of this obligation on the part of the Commonwealth violated petitioner's rights to due process of law.

C. *The Trial Justice Failed to Instruct as Requested or by Any Other Instruction that the Jury Must Find that Petitioner Knew the Female's Unlawful Purpose in Being on the Premises Before they Could Find him Guilty and that Such Proof Required a Finding that the Petitioner Perceived or was Aware of her Unlawful Purpose in Being on the Premises.*

As is set forth in Argument II.B., *supra*, it is a matter of law of the Commonwealth that proof of knowledge requires proof that petitioner perceived or was aware of the facts requisite to make up the crime. In this case the Commonwealth was required to prove that petitioner perceived or was aware of Connie Peria's unlawful purpose in being on the premises. Petitioner requested an instruction so charging the jury. The trial justice refused to give that instruction or any other instruction requiring the jury to make a

finding that petitioner perceived or was aware of Connie Peria's unlawful purpose in being on the premises before they could find him guilty. The failure so to instruct constitutes a constitutional deprivation because it eliminated the need for the jury to make an affirmative determination of a material element of the offense before they could find petitioner guilty.

Conclusion.

For the reasons stated, the petitioner urges this Court to grant the petition for a writ of certiorari to the Appeals Court of the Commonwealth of Massachusetts.

Respectfully submitted,

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Appendix A.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
No. 06285

COMMONWEALTH OF MASSACHUSETTS

v.

GEORGE M. BUCUVALAS

Motion to Dismiss the Complaint.

Now comes the Defendant and moves to dismiss the Complaint in the above-captioned matter and urges as grounds therefor the following:

1. The statute under which this Complaint is brought is unconstitutionally vague and overbroad in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution and Articles XII, XIV and XVI of the Declaration of Rights of the Constitution of the Commonwealth and infringes on rights protected by said Amendments and Articles.

2. The statute under which this Complaint has been brought does not, as a matter of statutory construction, apply to one who permits or knowingly suffers an adult female to resort to or be in or upon a place for the purpose of having consensual sexual intercourse with an adult male.

3. A person may not be convicted of a violation of G.L. c. 272 § 6 where the only evidence of unlawful acts on the premises does not include the act of sexual intercourse.

4. The Complaint fails to set forth a crime or offense plainly and fully, substantially and formally as required by Article XII of the Declaration of Rights of the Constitution of the Commonwealth.

WHEREFORE, the Defendant urges that this Honorable Court dismiss the above-numbered Complaint against him.

By his Attorneys,

MORRIS M. GOLDINGS
KENNETH H. TATARIAN
MAHONEY, HAWKES & GOLDINGS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPERIOR COURT
No. 06285

[Title omitted in printing.]

Defendant's Requests for Instructions to the Jury.

The Defendant requests that the Court include the following among its instructions to the jury:

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19. In determining whether the facts establish beyond a reasonable doubt that Miss Peria was there for the purpose of unlawfully having sexual intercourse, you should consider the fact that the Commonwealth has presented no testimony that an act of sexual intercourse occurred. Sexual intercourse is a particular type of sexual act. It is the natural

act of coition or copulation. The term sexual intercourse does not refer to types of sexual acts other than the natural act of coition or copulation. See *Commonwealth* v. *Delano*, 197 Mass. 166 (1908); *Commonwealth* v. *Lynes*, 142 Mass. 557 (1886).

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21. If you find beyond a reasonable doubt that Miss Peria was on the premises of the Two O'Clock Lounge for the purpose of unlawfully having sexual intercourse, then you must decide whether Mr. Bucuvalas knew that she was there for that purpose. You can find that Mr. Bucuvalas knew that she was there for that purpose only if you are convinced beyond a reasonable doubt that he perceived or was aware of the fact that that was her purpose in being there. If you do not find that he had such knowledge of her purpose, then you must find Mr. Bucuvalas not guilty. *See Commonwealth* v. *Altenhaus*, 317 Mass. 270 (1944).

22. If you find that Miss Peria's purpose was to engage in sexual intercourse on the premises, then you must determine whether that sexual intercourse was unlawful. Under our laws, sexual intercourse between unrelated, consenting adults in private is not unlawful. If you find that any sexual intercourse which occurred was between consenting adults under circumstances which would give a reasonable expectation of privacy to their conduct then you must find that the sexual intercourse was not unlawful. Unless you find that the sexual intercourse was unlawful, you must find Mr. Bucuvalas not guilty. *Commonwealth* v. *Balthazar*, 318 N.E.2d 478 (Mass. 1974).

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
No. 06285

[Title omitted in printing.]

Defendant's Assignment of Errors.

The Defendant respectfully assigns as errors with respect to the above-numbered Complaint the following:

1. The Superior Court justice erred in denying the Defendant's Motion to Dismiss the Complaint on the grounds that: (1) the statute under which the Complaint was brought is unconstitutionally vague and overbroad in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution and Articles XII, XIV and XVI of the Declaration of Rights of the Constitution of the Commonwealth in that the statute fails to provide adequate notice to persons of the conduct prohibited or adequate guidance to the trier of fact and impermissibly infringes on rights protected by said Amendments and Articles; (2) the statute under which the Complaint was brought does not, as a matter of statutory construction, apply to one who permits or knowingly suffers an adult female to resort to or be in or upon a place for the purpose of having consensual sexual intercourse with an adult male; and (3) that the Complaint fails to set forth a crime or offense plainly and fully, substantially and formally, as required by Article XII of the Declaration of Rights of the Constitution of the Commonwealth.

Tr. 26, Exception 1.
Defendant's Motion to Dismiss the Complaint.

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5. The Superior Court justice erred in denying the Defendant's Motion for a Directed Verdict made upon the close of the Commonwealth's case, on the grounds that: (1) there was insufficient evidence from which the jury could find beyond a reasonable doubt: (a) that Connie Peria had resorted to or was in or upon the premises for the purpose of unlawfully having sexual intercourse, (b) that Defendant Bucuvalas knowingly suffered Connie Peria to resort to or be in or upon the premises for said purpose, or (c) that Connie Peria had unlawfully had sexual intercourse on the premises with another person or had offered to have such unlawful sexual intercourse; (2) there was no corroboration in a material particular as required by G.L. c. 272 § 11; (3) G.L. c. 272 § 6 does not, as a matter of statutory construction, reach even the knowing sufferance of an adult female to be upon premises for the purpose of engaging in private consensual sexual intercourse with an adult male; and (4) G.L. c. 272 § 6, as applied to the Defendant, is unconstitutionally vague and overbroad for the reasons stated in Assignment of Error No. 1(1).

Tr. 244, Exception 8.
Motion for Directed Verdict of Not Guilty.

6. The Superior Court justice erred in denying the Defendant's Motion for a Directed Verdict made upon the close of all the evidence on the same grounds as are stated in Assignment of Error No. 5.

Tr. 245, Exception 10.
Motion for Directed Verdict of Not Guilty.

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8. The Superior Court justice erred in instructing the jury that sexual intercourse between married persons is lawful but that sexual intercourse between unmarried persons or between a married person and an unmarried person or between any two persons one of whom is a prostitute, even if such acts are consensual and in private, is unlawful and in failing to instruct the jury in accordance with Paragraph 22 of Defendant's Requests for Instructions to the Jury on the grounds that the instructions given and the failure to instruct in accordance with Paragraph 22, individually and together: (1) gave the jury an erroneous standard by which to determine whether the sexual conduct was unlawful and failed to instruct the jury in accordance with the prevailing standard of the lawfulness of sexual intercourse between adults; (2) deprived the Defendant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth; and (3) subjected the Defendant to the retroactive application of criminal law in violation of Article I § 10 and the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth.

Tr. 312, Exception 13.
Defendant's Requests for Instructions to the Jury, Paragraph 22.

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9. The Superior Court justice erred in instructing the jury, by reference to the statute defining the crime of rape, that unnatural sexual intercourse is unlawful and is a form of sexual intercourse on the grounds that such instruction: (1) was entirely unrelated to the charge against the

Defendant and was prejudicial to the Defendant and confusing to the jury; (2) impermissibly suggested that the term "sexual intercourse" in G.L. c. 272 § 6 applied to sexual conduct other than the entry of the male sexual organ into the female sexual organ; (3) deprived the Defendant of due process of law as secured by the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth; and (4) subjected the Defendant to the retroactive application of criminal law in violation of Article I § 10 and the Fourteenth Amendment to the United States Constitution and Article XII of the Declaration of Rights of the Constitution of the Commonwealth.

Tr. 313, Exception 14.

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15. The Superior Court justice erred in failing to instruct the jury in accordance with Paragraph 19 of Defendant's Requests for Instructions to the Jury on the grounds that the failure to so instruct left the jury without a correct definition of the term "sexual intercourse" as used in G.L. c. 272 § 6 and permitted the jury to convict the Defendant of a crime other than that charged in the Complaint in violation of Defendant's rights to due process of law under the constitutional provisions stated in Assignment of Error No. 10.

Tr. 314, Exception 17.
Defendant's Requests for Instructions to the Jury, Paragraph 19.

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17. The Superior Court justice erred in failing to instruct the jury in accordance with Paragraph 21 of Defendant's Requests for Instructions to the Jury on the

grounds that the failure to so instruct left the jury without a definition of or standard for determining whether the Defendant had the requisite knowledge of the purpose for which Miss Peria was alleged to have resorted to or been upon the premises and permitted the jury to find the Defendant guilty without a determination that the Defendant perceived or was aware of the facts which constituted the offense in viclation of Defendant's rights to due process of law under the constitutional provisions stated in Assignment of Error No. 10.

Tr. 314, Exception 17.
Defendant's Requests for Instructions to the Jury, Paragraph 21.

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Appendix B.

APPEALS COURT.

COMMONWEALTH *vs.* GEORGE BUCAULIS.[1]

Suffolk. January 9, 1978. — February 24, 1978.

Present: HALE, C.J., KEVILLE, & BROWN, JJ.

Prostitution, Maintaining premises for. *Constitutional Law*, Vagueness of statute. *Practice, Criminal*, Charge to jury. *Evidence*, Form of question. *Witness*, Corroboration. *Words*, "Sexual intercourse."

COMPLAINT received and sworn to in the Municipal Court of the City of Boston on October 15, 1976.

On appeal to the Superior Court the case was tried before *Lappin*, J.

Kenneth H. Tatarian (*Morris M. Goldings* with him) for the defendant.

Timothy P. O'Neill, Assistant District Attorney, for the Commonwealth.

HALE, C.J. The defendant was convicted in a District Court on a complaint charging him with knowingly having suffered the presence of certain females for the purpose of unlawfully having sexual intercourse in premises under his control in violation of G. L. c. 272, § 6. Upon claiming an appeal the defendant was again tried along with one Connie Peria before a jury in the Superior Court.[2] He was again found guilty of violating G. L. c. 272, § 6, and now appeals, arguing several assignments of error.

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[1] We adopt the spelling of the defendant's surname which appears in the criminal complaint, while noting that in the pleadings and memoranda submitted by the defendant's attorney the name is spelled "Bucuvalas" and that elsewhere in the record the name also appears as "Bucaualis." [Note: The correct spelling of the defendant's surname is "Bucuvalas."]

[2] Peria was charged with and found guilty of the offense of prostitution. She has not appealed.

1. We address first the defendant's claim that the judge erred in denying his motions for a directed verdict of not guilty and his motion to set aside the verdict of guilty in that the Commonwealth had failed to present sufficient evidence from which the jury could have concluded that the defendant was guilty of the offense charged. This contention leads us to inquire whether the evidence, read in the light most favorable to the Commonwealth, was sufficient to warrant a finding of guilty. *Commonwealth* v. *Mangula*, 2 Mass. App. Ct. 785, 786 (1975).

There was evidence admitted against the defendant from which the jury could have found the following facts. The defendant was the president and a director of the United Food Corporation, which does business as the Two O'Clock Lounge in the "Combat Zone" of Boston. The defendant also served as manager and principal representative of the lounge with full authority to control the premises described in the liquor license. As manager, the defendant was usually present and in charge of the lounge during business hours. He was present in the lounge during the events at issue in this case.

The defendant's managerial responsibilities included arranging for entertainment and keeping track of all the "girls" who were employed by the lounge. The primary form of entertainment in the lounge was provided by female performers who stripped and danced in the nude. When those entertainers were not performing, they mingled with the customers and attempted to convince them to purchase bottles of champagne at prices ranging from $6.25 to $150. Peria was employed by the lounge as such a performer at a salary of $100 a week.

In the late afternoon of October 14, 1976, a male customer, one Wolfe, spoke with a barmaid in the main room of the lounge. As the result of that conversation the

barmaid summoned Peria, who appeared wearing a white negligee. Wolfe then had a conversation with Peria and the barmaid, as the result of which Wolfe paid Peria $50. She in turn gave the money to the barmaid. Peria then led Wolfe into a room in the back of the lounge. That room was darkened and otherwise unoccupied, as the bar located therein was not usually in operation during the afternoon. In a booth in that room Peria performed an act of fellatio on Wolfe. A champagne bottle and two glasses were later found in the booth. The bottle was partially empty, and there was champagne in each of the glasses.

At about 4:00 P.M. two police officers attached to the vice control unit of the Boston police department entered the lounge and were met by the defendant. The three proceeded to the rear of the premises and were engaged in conversation when Peria, clad in a white negligee, came running from the back room. About ten to fifteen seconds later Wolfe emerged from the same room. Wolfe immediately addressed the officers and the defendant, claiming that after the completion of the act of fellatio he had discovered that his wallet was missing and that it had been stolen.[3]

As a result of the information gathered by the officers in this conversation, criminal complaints issued against Peria and the defendant.

The offense defined by G. L. c. 272, § 6,[4] may be analyzed as requiring the proof of three elements: (1) that

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[3] Wolfe testified that he found the wallet in his pocket when he arrived at his home.

[4] General Laws c. 272, § 6, reads as follows: "Whoever, being the owner of a place or having or assisting in the management or control thereof, induces or knowingly suffers a female to resort to or be in or upon such place, for the purpose of unlawfully having sexual intercourse, shall be punished as provided in section three."

the defendant owned, managed or assisted in the management or control of certain premises; (2) that a female was present on those premises for the purpose of unlawfully having sexual intercourse, and (3) that the defendant induced or knowingly suffered the female's presence on the premises for that purpose. We consider the evidence introduced by the Commonwealth in this case to be sufficient to support the jury's finding that the defendant was guilty of the alleged offense. See *Commonwealth* v. *Martin*, 304 Mass. 320, 322 (1939).

The defendant does not seriously contend that the Commonwealth failed to present sufficient evidence as to the first element of the offense. There was ample evidence of the defendant's management and responsibility for the lounge premises. The defendant does, however, challenge the sufficiency of the evidence on the second element. He argues that the Commonwealth proved only that Peria was employed by the lounge as an entertainer and that at most the evidence indicates Peria's willingness to engage in sexual activity rather than her "purpose" to be so engaged. We do not agree. Peria's employment as an entertainer in the lounge does not rule out the inference that her duties also included the performance of sexual services. Given the type of establishment, Peria's occupation and costume, and her response to the barmaid's call and subsequent performance of fellatio for payment, it was open for the jury to determine as a matter of fact that Peria was available for sexual intercourse with customers who desired such service.

The defendant also challenges the sufficiency of the evidence introduced by the Commonwealth with regard to the third element of the offense. He cites the case of *Commonwealth* v. *Altenhaus*, 317 Mass. 270, 273 (1944), for the proposition that the proof of knowledge required to support a verdict of guilty in certain criminal offenses is not

made out when the facts proven are as consistent with an innocent explanation as with a guilty one. The defendant claims that as there was no evidence that he either participated in or was aware of the transaction between Peria, Wolfe and the barmaid, the Commonwealth's evidence could fairly be characterized as establishing both his ignorance of the transaction and his innocence of the offense.

We regard the *Altenhaus* case as distinguishable on its facts. The evidence in the present case indicates a transaction for sexual services performed on licensed premises, which was undertaken openly at the main bar of the lounge during regular business hours by two employees normally under the direct supervision of the defendant. In view of the apparent openness of this transaction the jury could reasonably infer that the fifty dollars paid to the barmaid was payment for more than champagne and that the lounge made a profit on the sexual aspects of the transaction. Given these and all the other circumstances in the case, the jury could reasonably conclude that the defendant, as manager of the lounge, was aware of and acquiesced in his employees' illicit sexual activities.

2. The defendant also contends that his motions for a directed verdict of not guilty and his motion to set aside the verdict of guilty should have been allowed on the ground that the Commonwealth had failed to satisfy the requirement under G. L. c. 272, § 11, that "[a] person shall not be convicted under sections two to six [of chapter 272], inclusive, upon the evidence of one witness only, unless his testimony is corroborated in a material particular." We do not agree that the quoted provision had any application in the circumstances of this case.

The testimony of two police officers regarding their observations of Peria's and Wolfe's emergence, within seconds of each other, from the back room of the lounge

and the officers' discovery of a bottle of champagne and two glasses in a booth in the back room served to corroborate Wolfe's testimony as to what transpired between Peria and himself. This in turn constituted sufficient corroboration of a "material particular" of Wolfe's testimony for the purposes of G. L. c. 272, § 11. Cf. *Commonwealth* v. *Taschetta*, 252 Mass. 158, 160 (1925) (testimony by defense witnesses that defendant had taken a woman to a house in Springfield and that she had subsequently left with him, found sufficient in relation to G. L. c. 272, § 11, to corroborate woman's testimony of defendant's conduct while in the house in prosecution for violation of G. L. c. 272, § 2). There was no error in the denial of the motions.

3. The defendant argues next that G. L. c. 272, § 6, the statute under which he was charged, is impermissibly vague in violation of both the Fourteenth Amendment to the United States Constitution and art. 12 of the Declaration of Rights. He claims that the standard defined under the statutory prohibition of a "purpose of unlawfully having sexual intercourse" is so ambiguous as to preclude fair notice or warning to potential offenders of the type of conduct which is proscribed. In addition to this alleged facial invalidity, the defendant contends that the statute is impermissibly vague as applied to the circumstances of this case. He claims that in light of recent rulings that certain penal statutes do not reach sexual conduct which occurs between consenting adults in private, see e.g. *Commonwealth* v. *Balthazar*, 366 Mass. 298, 302 (1974), habeas corpus granted sub nom. *Balthazar* v. *Superior Court*, 428 F. Supp. 425 (D. Mass. 1977), he could not have been on notice that it was "unlawful" for Peria to engage in sexual activity with Wolfe in a darkened and otherwise unoccupied room. The defendant argues finally that the

term "sexual intercourse," as employed in the statute, is commonly understood as describing only the act of coition; and the present construction of that term as including the act of fellatio, which is necessary to support the defendant's conviction in this case, was unforeseeable and is therefore in violation of his due process rights. See *Bouie* v. *Columbia*, 378 U.S. 347, 352 (1964).

As there are no First Amendment issues involved in the defendant's challenge to the statute, we examine his claim of statutory vagueness solely in relation to the facts of the case at hand. *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). *Commonwealth* v. *Gallant*, ___ Mass. ___, ___ (1977) [Mass. Adv. Sh. (1977) 2254, 2259]. Having done so, we conclude that the standard set by G.L. c. 272, § 6, is sufficiently comprehensible for the defendant to have been on notice of the unlawfulness of his conduct in this case. See *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971); *Commonwealth* v. *Jarrett*, 359 Mass. 491, 496-497 (1971).

By performing sexual acts for hire Peria committed the offense of prostitution.[5] Sexual conduct of that nature is manifestly unlawful. *Commonwealth* v. *King*, ___ Mass. ___, ___-___ (1977) [Mass. Adv. Sh. (1977) 2636, 2642-2643]. Those privacy rights which might be recognized with regard to certain sexual conduct engaged in between consenting adults in private cannot be raised in defense of the commission of prostitution on premises to which the public has access. *Id.* at ___ [Mass. Adv. Sh. (1977) at 2646]. The conduct of the defendant and his employees falls squarely within the "hard core" of the statute's prohibitions. He cannot complain of the potential constitutional dubiety of G.L. c. 272, § 6, when applied to certain border-

[5] See footnote 2, *supra*.

line situations. *Commonwealth* v. *Orlando*, ____ Mass. ____, ____ (1977) [Mass. Adv. Sh. (1977) at 84, 87].

Moreover, the defendant's contention that his due process rights were violated by the construction of the statutory term "sexual intercourse" to include the act of fellatio is also without merit. The meaning of the language of a statute may be measured by common understanding and practice. *Commonwealth* v. *Jarrett*, *supra* at 497. *Commonwealth* v. *Balthazar*, 366 Mass. at 300. The term "sexual intercourse" has commonly been employed to describe a variety of sexual conduct, including the act of fellatio. See G.L. c. 265, §§ 22, 23; *Commonwealth* v. *Gallant*, *supra* at ____ [Mass. Adv. Sh. (1977) at 2263] (defining "natural" and "unnatural" intercourse under G.L. c. 265, § 23). There is nothing before us which indicates that the act of fellatio was previously considered to be outside the scope of the statute. See *Rose* v. *Locke*, 423 U.S. 48, 53 (1975). We accordingly conclude that the defendant should have understood that his conduct was in violation of the statute. See *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972); *Commonwealth* v. *Klein*, ____ Mass. ____, ____ (1977) [Mass. Adv. Sh. (1977) 1393, 1405] (dictum).

4. The defendant next assigns as error several portions of the judge's instructions to the jury, particularly with regard to the judge's refusal to charge in accordance with certain requests for instructions. After having reviewed the charge as a whole, *Commonwealth* v. *Pinnick*, 354 Mass. 13, 15 (1968), we conclude that the judge's instructions to the jury were both fair and complete. As certain of the defendant's requests for instructions on the definition of the words "unlawful sexual intercourse" were either at odds with the law of the Commonwealth or unsupported by the evidence in the case, the judge was correct in declining to give them. *Commonwealth* v. *Kleciak*, 350 Mass. 679,

691-692 (1966). The remaining requests for instructions were substantially covered in the judge's charge. The judge was not bound to instruct the jury in the exact language suggested by the defendant. *Commonwealth* v. *Aronson*, 330 Mass. 453, 458 (1953). *Commonwealth* v. *Edmonds*, 365 Mass. 496, 506 (1974).

5. The defendant objects last to the judge's ruling which permitted one of the police witnesses to respond in direct examination to the assistant district attorney's query: "Are you familiar with the method of operation of the Two O'Clock Lounge?" The judge overruled the defendant's objection to the question and denied the defendant's request that the Commonwealth be required to make an offer of proof.[6] The defendant now claims that, by allowing the witness to respond to so broad a question, the judge made it possible for the witness to interject prejudicial and otherwise incompetent evidence before the jury.

Decisions as to the form and relevancy of questions in the examination of witnesses are within the discretion of the trial judge. *Commonwealth* v. *Slaney*, 345 Mass. 135, 142 (1962). *Commonwealth* v. *Barras*, 3 Mass. App. Ct. ____, ____ (1975) [Mass. App. Ct. Adv. Sh. (1975) 193, 198]. In view of the judge's limitation of the scope of the question[7] and his close scrutiny of the subsequent testimony by the witness, we perceive no abuse of discretion; nor was there prejudice to the substantial rights of the defendant resulting

[6] The defendant excepted only to the judge's denial of the request for an offer of proof.

[7] In response to the defendants' objections to the question the judge stated, "He [the witness] may testify as to his observations as to how it is run, what takes place there, whether there are shows there, whether there is entertainment, whether there are B-girls, all of which if he knows he may testify." The witness had previously testified that he had been in the lounge "hundreds of times" pursuant to his duties as a vice control officer.

from the allowance of the assistant district attorney's question in that form. See *Commonwealth* v. *Greenberg*, 339 Mass. 557, 580-581 (1959), and cases cited.

Judgment affirmed.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT FOR THE COMMONWEALTH,

AT BOSTON, *February 24, 1978.*

IN THE CASE OF COMMONWEALTH *vs.* GEORGE BUCAULIS, pending in the Superior Court for the County of Suffolk.

ORDERED, that the following entry be made in the docket; viz., — *Judgment affirmed.*

BY THE COURT,

JOHN E. POWERS,
Clerk.